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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1682

JOHN ELWOOD DENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ALTERNATIVE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS OR FOR ENTRY OF AN ORDER UNDER RULE 35, RULES OF THE SUPREME COURT OF THE UNITED STATES, ORDERING THE REINSTATEMENT OF THE APPEAL IN THE TENTH CIRCUIT COURT OF APPEALS.

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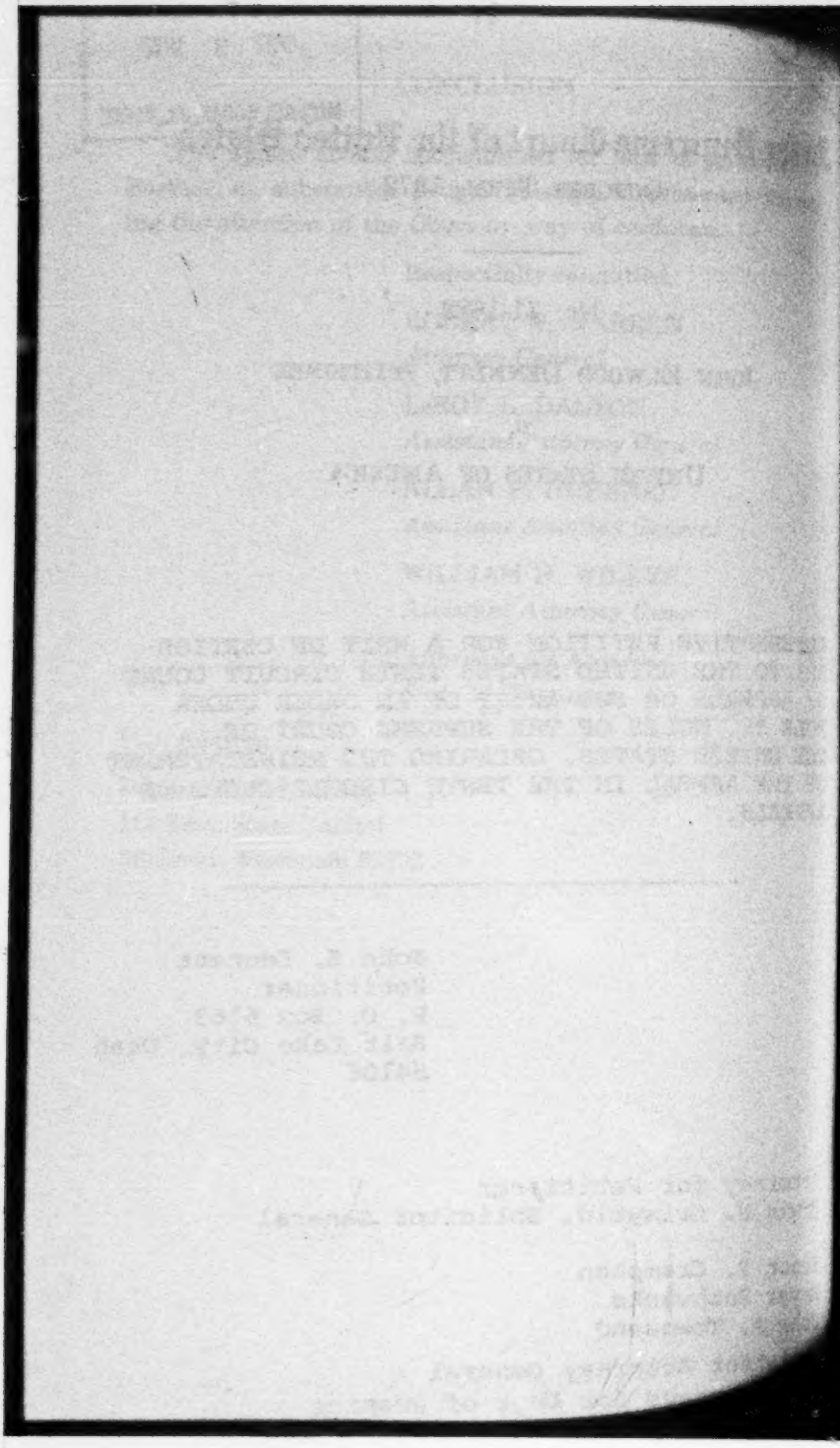

IN THE

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October Term, 1972

No. 71-1682

JOHN ELWOOD DENNETT

Petitioner

vs.

UNITED STATES OF AMERICA,
and THE TENTH CIRCUIT COURT
OF APPEALS

Respondant

ALTERNATIVE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS OR FOR ENTRY OF AN ORDER UNDER RULE 35, RULES OF THE SUPREME COURT OF THE UNITED STATES, ORDERING THE REINSTATEMENT OF THE APPEAL IN THE TENTH CIRCUIT COURT OF APPEALS.

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Petitioner prays alternatively that

(a) a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in its case No. 71-1466 entitled Continental Bank and Trust Co., plaintiff, vs. John Elwood Dennett, defendant and appellant, the United States of America, defendant and appellee, and others, defendants, on January 26th, 1972 with respect to which a petition for rehearing was de facto denied on February 15, 1972,

or

(b) this court enter its order under the provisions of Rule 35, Rules of the Supreme Court of the United States, vacating the order of dismissal and ordering the appeal reinstated.

REFERENCE TO THE OPINIONS OF THE LOWER COURT

The United States District Court for the District of Utah, where this matter originated wrote and published no opinion. The Tenth Circuit Court of Appeals likewise published no opinion in this matter. However, the order of the Tenth Circuit of January 26, issued in lieu of the opinion, and the order de facto denying a petition for rehearing of February 15, 1972 is set forth in this brief.

JURISDICTION

The jurisdiction of this court is invoked under 28 USC 1254(1), 1651(a), and 2241. The jurisdiction of the trial court was invoked under 28 USC 2410 and 2201(c).

STATUTES INVOLVED

28 USC 144. Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

INTERNAL REVENUE CODE Section 6501(a)Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed).

(c)Exceptions: (4) Extension by agreement--Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title.... both the Secretary or his delegate and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

INTERNAL REVENUE CODE Section 6303. Where it is not otherwise provided by this title, the Secretary or his delegate shall, as soon as practicable, and within 60 days, after making of an assessment of a tax pursuant to section 6203, give notice to each person liable for the unpaid tax, stating the amount and demanding the payment thereof. Such notice shall be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person's last known address.

INTERNAL REVENUE CODE Section 6871. Immediate Assessment. Upon the adjuciation of bankruptcy of any taxpayer in any liquidating proceeding, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts or additions to the tax provided by law) determined by the Secretary or his delegate in respect to a tax imposed by subtitle A or B upon such taxpayer shall, despite the restrictions imposed by section 6213(a) upon assessments, be immediately assessed if such deficiency has not theretofore been assessed in accordance with law.

(b) Claim filed despite Tax Court proceedings. In the case of a tax imposed by subtitle A or B claims for the deficience and such interest, additional amounts and additions to the tax may be presented, for adjudication in accordance with the law, to

the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Tax Court; but no petition for any such redetermination shall be filed with the Tax Court after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against any tax payer in any other bankruptcy proceeding, or the appointment of a receiver.

INTERNAL REVENUE CODE 6331. Levy and distraing (a) Authority of Secretary or delegate-- If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sums as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under Section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon accrued salary or wages of any officer, employee or elected official of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeapordy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

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(b) The term "levy" as used in this title includes the power of distraint and seizure by any means. A levy shall extend only property possessed and obligations existing at the time thereof. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or person, tangible or intangible.)

INTERNAL REVENUE CODE Section 6334.
Property Exempt from levy.

(3) Books and tools of a trade, business or profession. So many of the books and tools necessary for the trade, business or profession of the taxpayer as do not exceed in the aggregate $250.00 in value.

28 USC 46(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

CONSTITUTIONAL PROVISIONS

AMENDMENT V: No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice pur in jeapordy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property

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be taken for public use without just compensation.

THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 25: Filing and Service. (a) Filing: Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is utilized.

QUESTIONS PRESENTED

1. Whether the Tenth Circuit Court of Appeals and two of its justices have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

2. Whether the Tenth Circuit Court of Appeals has so far sanctioned such a departure by the United States District Court for the District of Utah as to call for an exercise of the Supreme Court's power of supervision.

3. Whether the summary order of dismissal of the Tenth Circuit Court of Appeals should not be vacated, the appeal should not be reinstated, and the matter should not be transferred to a different panel of Circuit Judges, or, if possible, to a different Circuit Court of Appeals for a determination of the issues on the merits, which would involve a determination of the following sub-issues:

(a) Whether a panel of two justices is a sufficient quorum to dispose of an appeal on the merits.

(b) Whether the panel of justices acting in this matter is not disposed to rule in all matters adversely to petitioner and without regard to the law; whether they and the clerk of the Tenth Circuit Court of Appeals are not disposed to find excuses to avoid hearing any of petitioner's matters on the merits.

(c) Whether the special problems exist-

isting between the two United States District Judges sitting in the District of Utah so great that it calls for the special supervision of the Tenth Circuit Court.

(d) Whether, in the exercise of that supervision, the Tenth Circuit Court has not become so biased in favor of the judge in Utah whom it favors, A. Sherman Christensen, that it has become disinclined to hear any appeals from his rulings, on the merits, and therefore seeks excuses to avoid hearing any appeals from any of his rulings, on the merits.

(e) Whether the Tenth Circuit Court of Appeals did not abuse its discretion in refusing petitioner the assistance he requested in obtaining his files and records in this case from the Treasury Department which was illegally and wrongfully withholding them from him, in refusing to grant petitioner the reasonable assistance or extensions he requested in order to obtain a transcript of the trial, in refusing to make reasonable allowances for petitioner's seriously impaired health and other circumstances in the fall of 1971, in attaching unjudicious importance to inconsequential matters of form which did violence to the substance, in disregarding the wishes of both appellant and appellee on which they agreed, with respect to the processing of the appeal, in refusing to show on its docket sheet the filing of briefs even when filed, in failing to consult the appellee with regard to its actions against appellant, or to notify it of its actions, in refusing both appellant and appellee the opportunity both wanted to settle the matter during the appeal, in harrassing appellant, even after the briefs were filed in order to disallow

the filing of the briefs even after they were filed, and to find an excuse to dismis petitioner's appeal.

(And the following questions that should have been reviewed by the Tenth Circuit Court of Appeals, but weren't):

4. Whether the alleged agreement between the taxpayer (petitioner) and the Treasury Department (respondant), which agreement would have the purport of extending the time in which to assess the taxes for 1961 was filled in at the time the appellant signed it, or whether the blanks were not filled in after appellant signed it,

5. If signed in blank, if the Treasury Agent Platte Clark filled in the blanks in accordance with the oral agreement between appellant and Platte Clark.

6. Irrespective of those questions, whether the purported extension was signed on or before May 3, 1965, the very latest date on which taxes for the year 1961 could be assessed or an agreement obtained for the extension of time in which to assess taxes on the 1961 return which was filed May 3, 1962.

7. If the taxes for 1961 were timely assessed, whether they were assessed in accordance with the procedures established by law, and if they were, whether the notice required by law, of the assessment to the petitioner .

8. Whether any fraud was involved on the part of the Treasury Department in making the assessment or giving the notices.

9. Whether there was a sufficient factual basis or any basis at all for the assessment which the Treasury Department did make.

10. Whether the assessment which the Treasury Department did make was not based upon an invalid extension regardless of the facts.

11. Whether an involuntary bankruptcy proceeding, forced upon petitioner against his will in 1967, did not discharge the appellant from any liability to the Treasury Department for any taxes which antedated the original bankruptcy petition filed September 15, 1967.

12. Whether the trial judge did not err in continuing to sit as judge in the case and in refusing to refer for determination by another judge, the question of his personal and extra judicial bias, prejudice and predisposition against and his personal dislike for the appellant, when the same was set at issue by a timely and sufficient affidavit of prejudice which petitioner filed against the trial judge.

13. Whether the trial judge, after framing the issues to be tried to determine the petitioner's tax liability as being the petitioner's income and expenses by the terms of his signed pre-trial order, did not err by permitting the government, without prior notice to petitioner, to abandon that theory and by permitting the government to attempt to prove the petitioner's tax liability by attempting to show an increase in net worth.

14. Whether the petitioner was not denied due process by permitting the government to suddenly change its theory in the middle of trial and by denying petitioner an opportunity to prepare a defense against the new theory and subpoena witnesses to rebut the circumstantial evidence upon which the new theory was based.

15. Whether the trial judge, after permitting the government to suddenly change its theory, did not err, by manifesting, in front of the jury, his exteme annoyance and impatience at petitioner's efforts to prove by the direct evidence contained in the original accounting records, to disprove erroneous impressions the government sought to establish through the use of circumstantial evidence alone.

16. Whether the trial judge did not err in instructing the jury that they could disregard the direct evidence contained in the accounting records, entirely.

17. Whether the trial judge did not err in permitting the jury to consider the increase in net worth theory at all when the only basis of the government's case was two financial statements prepared by petitioner 26 months apart (December 1960 and January 1963), and elaborate guess-work as to what petitioner's net worth was on December 31, 1961.

18. Whether the trial judge did not err in his relentless intimidation of the petitioner in front of the jury accompanied by belittlement of petitioner, and making insulting, slurring, mocking and deprecating remarks about petitioner and his evidence.

19. Whether the totality of the trial judge's facial expressions, tone of voice, inflexion, scoffing, sneering, ridiculing, scorning, gestures, mannerisms, mimicing, and mocking petitioner in front of the jury was not so flagrant as to be tant-amount to a denial of due process, or if not that, prejudicial error.

20. Whether the trial judge did not err in praising himself before the jury, in making tedious and repetitious mention of his own wide experience, including his trial of "criminal tax fraud cases", and by his frequent mention of his invitations to sit on Ciruit Courts of Appeal, all calculated to impress the jury with his own supposed expertise and to depreecate the petitioner.

21. Whether the trial judge did not err in dismissing petitioner's cross claim against Beneficial Life Insurance Company filed by petitioner to compel them to accept payments under the terms of a mortgage.

22. Whether the trial judge did not err in permitting the government to read into evidence depositions of witnesses which were taken without proper notice and which contained incompetent, irrelevant and erroneous and misleading information.

FEDERAL JURISIDICTION BELOW

Federal jurisdiction in the first instance was based on 28 USC 2410 and 2201(c).

STATEMENT OF THE CASE

This case began in the United States District Court for the District of Utah as an interpleader action. Continental Bank and Trust Company sold to one C. Dwayne Harrison two cashier's checks totalling $7,052.00. C. Dwayne Harrison tendered them to Beneficial Life Insurance Company which held a mortgage on a home which at one time had belonged to petitioner, but which at the time of the tender had been sold to and therefore belonged to Mr. Harrison. Beneficial Life Insurance refused the tender and returned the checks to C. Dwayne Harrison. Mr. Harrison went to the bank to have them reissued in favor of the court clerk preparatory to filing suit against Beneficial Life Insurance Company to force them to take the payments. The cashier at the bank took the checks but would not reissue them, claiming that the bank had been served a notice of levy by the Treasury Department for the purpose of collecting a delinquent tax assessment against the petitioner.

A year earlier, petitioner had illegally and contrary to the evidence been involuntarily adjudged a bankrupt. An attempt to overturn the illegal adjudication through appeal was brushed off by the Tenth Circuit Court without receiving briefs, argument, or without stating any reason for its actions. A petition for certiorari to this court was denied. When the file was returned to the lower court, the referee Bruce S. Jenkins appointed Herschel J. Saperstein as trustee, contrary to the vote of the creditors, contrary to the law and contrary to the evidence. A petition to review the referee's order was brushed off

by Judge A. Sherman Christensen who refused any hearing on the matter. An appeal from his order to the Tenth Circuit Court by petitioner and the creditors was brushed off, likewise without briefs or hearings and likewise without giving any reasons for its actions.

Although nothing has happend since that time, the bankruptcy languishes still before the referee. Everybody ignores it, petitioner and creditor alike, and nobody knows what to do with it. Yet Herschel J. Saperstein nominally stands in charge of the estate, whatever that is.

Continental Bank and Trust, confronted with the conflicting claims of C. Dwayne Harrison, Beneficial Life Insurance Company, the United States Treasury Department, and Herschel J. Saperstein to the money simply filed an interpleader action, paid the money into court and asked the Federal Judge to decide whom it belonged to.

Petitioner reacquired the subject property during the pendency of the litigation from C. Dwayne Harrison and filed a cross claim against Beneficial Life Insurance Company to enforce its obligation to accept the payments on the mortgage it held on the property. C. Dwayne Harrison filed his cross claims asking that the money be paid in cash to him. Herschel J. Saperstein filed his cross claim claiming that the money be paid to the petitioner's estate. The United States filed its cross claim asking that the money be applied to an alleged tax deficiency for the year 1961. Beneficial Life Insurance Company filed a disclaimer in the Federal action and a separate action in the State Court to seek a $30,000.00 windfall, being the difference between a

$30,000.00 mortgage which they held and the $60,000.00 value of the home.

The trial court ultimately dismissed the petitioner's cross claim against Beneficial Life Insurance Company, dismissed the action as to Continental Bank and Trust Company and let the matter go to trial as to the conflicting claims of C. Dwayne Harrison, the petitioner, Herschel J. Saperstein, and the United States of America. At the conclusion of the trial, the court awarded the funds to the United States, a fact by itself not worth the cost and aggravation of the appeals, but also, as a bonus, awarded the United States a judgment upon its assessment for the 1961 taxes, which it assessed three years later than the law allows it to assess taxes, upon a claim which the illegal involuntary bankruptcy had discharged, and upon the theory of an increase in net worth which the court's own pre-trial order outlawed. Moreover, the trial court heard the case notwithstanding the petitioner's fifth or sixth attempt to disqualify him by filing an affidavit alleging personal bias and prejudice, which he, as he always does, simply ignored. Besides the errors of law which litigants in Utah are accustomed to, the trial was laced with slurs, insults, mimicry, mocking, ridicule, sneers and scorn, and became, as usual, not a trial on the law and facts, but an onslaught on the part of the trial judge against the petitioner.

The most significant legal effect of the proceeding was that the assessment for the 1961 income taxes assessed against the petitioner in 1968 was reduced to a judgment in the Federal Courts.

Despite the futility of resisting any litigation in the Utah Courts, and despite the futility of trying to appeal any decision of Judge A. Sherman Christensen to the Tenth Circuit Court (where he frequently sits as an appellate judge by invitation), petitioner made the best possible record, which included a timely affidavit of prejudice stating with particularity the particular facts underlying the personal bias, prejudice and dislike of Judge A. Sherman Christensen against petitioner (which he ignored) and which included petitioner's best attempt to prove the accuracy of his original tax return from accurate and complete books of original entry (which he instructed the jury to ignore) in accordance with the theory set forth in the pre-trial order, to resist and overcome the attempt of the government to prove an increase in net worth, which was based upon vague conjecture and in which they totally failed, and which was offered as a complete surprise to petitioner and contrary to the pre-trial order, and which included proper jury instructions prepared by petitioner and an effort to resist the improper jury instructions given by the court.

After timely motions for a new trial, non-obstante verdicto judgments, etc., which were denied, petitioner filed a timely notice of appeal to the Tenth Circuit Court of Appeals.

The United States District Attorney, who had first-hand knowledge of the maelstrom of litigation surrounding petitioner (in the Federal and State Courts) was generous in stipulating to extensions for filing the briefs on appeal. The District Attorney knew of the inability of petitioner to raise the $1,000.00 necessary to pur-

chase a transcript and knew of a separate action in New York City set to be tried for one month commencing November 1, 1971, and therefore did not hesitate to stipulate to whatever extensions were necessary in order to permit the orderly processing of the appeal.

The Tenth Circuit Court of Appeals delegates to its clerk the authority to grant or deny motions for extensions of time. The Clerk of the Tenth Circuit Court of Appeals is not so kindly disposed towards petitioner. Except for one matter, every appeal taken by petitioner to the Tenth Circuit Court has become not a contest between the litigants, but between petitioner and the Court Clerk (and two of the justices who more or less support him in his actions) to bring the appeal to the point where briefs can be filed and the action disposed of on the merits. Since 1967 the clerk has successfully prevented more than a dozen appeals made by petitioner to the Tenth Circuit Court from being heard on the merits.

On September 17, 1971, the United States and petitioner, with a view to the month-long trial facing petitioner in New York City commencing November 1, 1971, stipulated to a 90-day extension in which to file briefs (with an oral understanding that an additional extension would be needed and would be granted at the end of the 90-day period). On September 22, 1971, the court entered an order granting an extension, not for 90 days, but for the remainder of the 60 days, which expired November 16, 1971. The clerk notified neither petitioner nor the United States that the stipulation had been acted upon, or that the time had been

shortened from 90 days to 60 days and would therefore expire in the middle of the time period set aside for the New York trial. (A copy of the general docket sheet is included in this petition).

On October 7, 1971, however, something very unusual and unexpected happened.

Petitioner maintained desk space, some litigation files, and a small library at an office at 1243 East 2100 South, Salt Lake City, Utah. The office is small and is primarily occupied by about six publicly held and three privately held corporations who jointly employed one 20-year old girl. Petitioner was sojourning in Los Angeles on October 7, 1971.

Near closing time, four men, Steve Hirst, Al Steadman, Norman Oldham and a fourth whose name is not known made a sudden appearance, without prior announcement, at the office. They had with them a "notice of levy" and "notice of seizure" (copies are reproduced in this brief) which were based upon the 1968 assessment of petitioner's 1961 income taxes which had become merged into the judgment of the United States District Court which was the subject matter of the appeal then pending and is the subject matter of this petition. They had no writ of execution from the United States District Court Clerk's office, no other court process of any kind, no search or seizure warrant, and no authority to evict. The United States Marshall, charged by law with the exclusive authority to enforce court judgments, had no knowledge of the visit aforesaid.

The 20-year old girl aforesaid, being horrified and terrified at their menacing and sudden presence, made one unsuccessful attempt to reach petitioner by telephone in California, then upon her visitors' demand, turned over the keys and fled the office.

The visitors proceeded to ransack the office, helping themselves indiscriminately to confidential client and corporation files, strictly personal items, and items not belonging to petitioner. They took with them what they pleased, leaving behind, in hopeless confusion, the remainder of the files and papers, and placed an auxiliary lock on the outside doorknob, thereby preventing any ingress and thereby evicting not only petitioner, but all six corporations aforesaid from the office premises. This was done summarily, without notice or hearing, and without court process.

The imminency of the November 1, 1971 trial in New York City made the filing of an action in Federal Court to force the reopening of the office impractical. Petitioner's file in this very case was one of the items taken in the raid, and no amount of persuasion would induce the Treasury Agents to return at least the one item so that petitioner could prosecute his appeal from the very claim they were acting upon.

The trial in New York turned out to be shorter than anticipated. Instead of lasting until November 30th, as planned, it terminated November 15th. This was indeed fortunate. The adverse weather, food, shelter and transportation conditions in New York City, coupled with the refusal of the Federal Judge there to appoint counsel, as previously promised, had combined to make petitioner seriously ill. The bronchitis which petitioner had on November 15, 1971 progressed to pneu-

monia in December, remained extremely serious until May 1972 and still afflicts petitioner partially.

Petitioner returned to Salt Lake through Denver and learned for the first time that the 90 day stipulated extension had been shortened to 60 days, and that it would expire the very next day.

Petitioner borrowed a typewriter and filed a motion asking the Tenth Circuit Court to fashion some type of appropriate relief that would remove the effect of the illegal treasury seizure of his file, restore the same to him so that he could have some type of information from which to prepare a brief, and which (relief) would give him some assistance in obtaining a transcript of the proceedings, for which petitioner had no funds, and for some time in which to recover financially from the trial in New York and physically from his serious and obvious illness.

The court completely ignored petitioner's request for help in obtaining his file in this case, completely ignored his request for assistance in obtaining a transcript of the trial, completely ignored petitioner's physical illness, and notified petitioner (on December 1, 1972) that petitioner had until December 20, 1971 to file an "opening brief" (whatever that is) presumably on the basis of memory or recollection alone (since the court file was in Denver and petitioner's file was in the hands of the Treasury Department) with the proviso that NO FURTHER EXTENSIONS WILL BE GRANTED. (See General Docket Sheet).

The United States District Attorney,

attorney for the appellee, while in disagreement with the action of the court, and while sympathetic to the unsurmountable problems this order portended and petitioner's ill health, felt powerless to further aid petitioner, citing as a reason the recent anger of the Tenth Circuit Court towards the government which arose in a recent but unrelated case. He suggested that petitioner recover his health the best he could in the next 20 days and write the best "opening brief" he could from memory.

Bedridden during the ensuing 20 days and under Doctor's care, petitfoner, against medical advice, arose from his sickbed on December 19, 1971, returned from California, where he was convalescing,to Salt Lake City, and spent a day a night and a day writing an "opening brief" from sheer unaided memory. The brief was cut short in the middle simply because petitioner ran out of time.

Petitioner took the required number of Xerox copies, bound them, and took them to the Salt Lake City airport postal facility. There he purchased metered postage sufficient to send them by airmail to Denver, thereby completing the filing as provided by Rule 25 of the Federal Rules of Appellate Procedure. However, the Salt Lake City airport was closed due to fog, and had been the entire day of the 20th of December, and fearing that the Clerk would enter an order of dismissal on December 21, 1971, petitioner re-took the package so that he could hand deliver it as soon as the fog lifted.

The fog lifted on December 21, 1971,

whereupon petitioner flew the briefs to Denver and personally delivered them to the clerk's office.

Petitioner took the time to discuss the intervening weather circumstances with the justice on duty and asked for any special instructions, since it was December 21st and not December 20th. The justice replied that he didn't want to say "yea" or "nea" to matters presented informally, but that petitioner should give the briefs to the clerk, supplementing them with any motions the petitioner thought appropriate.

The briefs did have covers, but they didn't have indices, which the deputy clerk observed ought to be included. Petitioner explained that these were merely "opening briefs", (whatever that is) and that appellant's "brief on appeal" would be filed at such time as he could get his file back and get a transcript of the proceedings.

Returning to Salt Lake City, petitioner served two copies on the United States District Attorney of the "opening brief", apologizing for the fact that it was prepared only from memory, and was therefore somewhat inadequate. The United States Attorney observed that this was probably all that could be done under the circumstances.

After the filing of the brief was entered on the docket sheet on December 21, 1971, someone entered in handwriting "Rec'd but not filed--need motion to file out of time; and cover, index and cert of service." No one notified either appellant or appellee of the handwritten entry on

the docket sheet.

The United States Justice Department, after reading the brief, saw that the appeal could not be disposed of until a final appellant's brief had been filed and a transcript prepared. It therefore very intelligently requested appropriate extensions of time, to which appellant naturally had no objection, in which to file a reply brief.

The United States, however, requested that the transcript of the trial (which had never been prepared and therefore did not exist) be sent to the Tenth Circuit Court.

The Tenth Circuit Court's Clerk's office, in the meantime, prepared its so-called "Rule 14 letter", complaining that petitioner had failed to file motion to file brief out of time; index, cover page and cert of serv. for brief".

Petitioner, now very seriously ill and under very closely supervised medical care, but refusing medically ordered hospitalization (see letter included in this brief), enlisted the aid of friends to prepare the items the Clerk's office complained were missing (although the certificate of service was moot since the United States had already responded, and although the cover page was not missing, notwithstanding the claim of the Clerk's office, and although they were not filed out of time, since they were postmarked December 20th, 1972).

The clerk, contacted by telephone, was asked whether he wanted the missing

items separately to include in the briefs he already had, or would like new briefs with the missing items included, replied that it would be nice if he could have a new set of briefs with the missing items included. Petitioner prepared a complete new Xerox set of briefs with the missing items included, bound them, and then, being too ill to travel, dispatched Kenneth V. Spackman, a friend,to Denver to hand deliver them to the clerk. He delivered them within the time allowed by the "Rule 14" letter.

The court took no action on the matter until January 26th, 1972. And then, acting sua sponte, and not on appellee's motion, and after misstating the record, denied appellant's motion for leave to file his opening brief on December 21, 1971 (which was really filed on time), and dismissed the appeal for failure to prosecute. Still seriously ill, petitioner filed, on February 10, 1972, a motion for an extension of time in which to petition for rehearing, which the court, thirteen days after sending the mandate to the District Court, denied summarily, and without reason on February 15, 1972.

There was, however, an interesting epilogue to the seizure of October 7, 1971. It unfolded while the appeal was in progress. Petitioner began discussing the question of the tax assessment with the revenue agents who made the seizure. At first hostile and skeptical, they quickly mellowed as the story behind the assessment unfolded. They were appalled to learn that the 1961 tax return was submitted preaudited by a Treasury Agent who was doing an audit on the 1958 and 1959 taxes during May of 1962 when the 1961 return was prepared

and filed (On May 2, 1962). They were also surprised to learn that the law only allowed three years (until May 2, 1965) in which to assess a deficiency or obtain an extension of time in which to assess a deficiency. They were amazed to learn that Treasury Auditor Platte Clarke, who came to petitioner in 1966, came to audit the years of 1964 and 1965, and was given access to the books for prior years in order to establish the cost basis for the depreciable capital assets. They could hardly believe that the 1968 assessment of the 1961 taxes was based on a purported written extension of time which on its face was executed on November 27, 1967 (2½ years too late). They were appalled to hear the details of how the trial unfolded; how Judge Christensen ignored the affidavit of prejudice filed against him, how he had permitted the government to suddenly change from an income and expense theory to an increase in net worth theory to prove its case, and the details of how their own illegal seizure had prevented the prosecution of the appeal, and how the Tenth Circuit Court had disregarded pleas for assistance in obtaining petitioner's file, and a transcript of the trial, and had disregarded petitioner's statements about his health.

They were at a loss as to how to help petitioner, and repeatedly emphasized that their department was charged with collecting assessments and not changing the amount of the assessment, but nonetheless, in light of the fact that these special circumstances existed, together with the involuntary bankruptcy which would have discharged the taxes, and the judgment into which the assessment would have been merged, they agreed that a complete re-audit and redetermination of the

1961 taxes could and would be made, and that the appeal and all other litigation regarding the same could and would be abandoned, and that the parties would thereby settle their differences.

Petitioner communicated by telephone with the United States Justice Department in Washington, D. C. regarding the agreement. A Mr. John Townsend with whom petitioner spoke, said the effort was laudable, but that he doubted the authority of the Treasury Agents to bind the government to such an agreement. However, he had no objection if Washington wanted to join into such an agreement.

While these negotiations were in progress, the Tenth Circuit Court dismissed the appeal, but did not notify the government of the dismissal.

It was not until petitioner approached the United States District Attorney for a stipulation to set aside the dismissal (which he declined to execute for fear of incurring the wrath of the Tenth Circuit Court) that he learned that the appeal had been dismissed.

There is one other procedural point which should be illuminated. Dismissals, which are adjudications of appeals, are acted upon in the Tenth Circuit Court by the clerk. It is indeed logical that the ministerial task of granting extensions should be delegated to the clerk, but the matter of denying extensions, which has the effect of terminating the appeal, is quite a different matter. 28 USC 46 requires that cases and controversies shall be heard and determined by a court or division of not more than three judges.

In this case, petitioner's matters were acted upon by two judges, who ruled not on the appellee's motions, but upon matters which they raised sua sponte.

On its face, a panel of two judges is "not more than three", and is therefore a quorum. But in light of the cases, this is not to be so understood. "Not more than three" is not to be interpreted as "three or less". It was meant to preserve the three-judge court. See 13 S Ct. 840, 149 US 259, 37 LEd 2d 725. See also 73 S Ct 656, 345 US 247, 97 L Ed 986. Also 363 US 685, 80 S Ct. 1336, 4 LED 2d 1491. It is respectfully submitted that the two-judge panel which acted on petitioner's matters was not a quorum.

THE MERITS

The merits of the appeal should be decided by a Circuit Court of Appeals. This petition may present a stronger case for vacating the order of dismissal and remanding it for a hearing than it does for certiorari. However, a brief preview of the merits might be in order.

THE EXTENSION OF TIME IN WHICH TO ASSESS THE TAXES WAS NOT TIMELY:

The 1961 Tax Return was filed within the time extended for filing on May 2, 1962 instead of April 15, 1962. Section 6501 gives the government three years, or until May 2, 1965 in which to assess any deficiency or in which to obtain a written extension. The agreement was signed in blank and was intended for use in another year. But even assuming the government's position to be correct, it was, by their version, signed on November 27, 1967, 2½ years too late

THE IRS GAVE NO NOTICE OF THE ASSESSMENT

Section 6303 of the IRS Code requires notice to be given within 60 days. The

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tax was assessed on January 25, 1968. No notice was given within 60 days or at all.

THE IRS MADE NO DEMAND FOR PAYMENT PRIOR TO SEIZURE.

Section 6331 et seq. requires that the IRS make demand for payment before seizure or levy and then wait 10 days. They gave no notice at all.

THE ILLEGAL ADJUDICATION OF PETITIONER AS AN INVOLUNTARY BANKRUPT WOULD DISCHARGE THE DEBT.

Not being trust funds, and the Treasury Department not having filed any antecedent liens, the illegal assessment becomes a claim against the estate only, any deficiency being discharge perforce of the bankruptcy act.

THE TRIAL JUDGE SHOULD HAVE DISQUALIFIED HIMSELF.

Petitioner filed in this case, as in many prior cases, an affidavit of prejudice against A. Sherman Christensen. It was timely, sufficient, and articulate. Because of the intense acrimony between the two Federal Judges in Utah, both refuse routinely to pay any attention to anyone's affidavit of prejudice. Neither judge wants the other judge to have any opportunity of finding personal bias or prejudice on the part of the other. Affidavits of prejudice alleging person bias on the part of either judge are routinely ignored in the Federal Courts in Utah.

THE VERDICT WAS BASED ON SHEER FANTASY.

The government attempted to prove its case by circumstantial evidence. It failed. They tried to establish petitioner's net worth in December 1960. In aid of this, they had a financial statement. They had no way of knowing petitioner's net worth in December 1961, but they did have a financial statment dated January 1963. They "interpolated" and surmised that half of the increase would have occured in one year and the other half in the other year. Despite this failure and the weakness of this argument, they pressed on, ignoring the fact that the January 1963 statement was based on non-taxable appreciation of capital assets. They also failed to give any allowance for the corresponding increase in liabilities during the same period. Their whole circumstantial case was based upon an "increase in assets" not an "increase in net worth," which is meaningless.

The original books of entry, corroborated by a correct assessment of petitioner's increase in net worth demonstrates the meticulous accuracy of the income tax return for 1961 as filed. Moreover, it was pre-audited and prepared with the assistance and approval of another treasury auditor who was auditing another year's returns at the time the 1961 return was prepared and filed.

THE SURPRISE CHANGE IN THEORIES DENIED PETITIONER DUE PROCESS.

The trial judge prepared a detailed, prolix pre-trial order. It provided that the question of petitioner's 1961 tax liability would be based upon income, receipts, expenses and disbursements. Petitioner came to court prepared to try his tax liability on those questions. Petitioner came dangerously close to being held in contempt of court for urging that theory after the trial judge, after commencement of the trial, changed the theory, suddenly and without warning, to the theory

of increase in net worth and refused the evidence which the pre-trial order provided for.

If it was not a denial of due process, it was plain error.

THE TOTALITY OF THE PROCEEDINGS AND THE JUDGE'S CONDUCT BEFORE THE JURY AND THE ERRONEOUS JURY INSTRUCTIONS WERE AN AGGRAVATED OUTRAGE.

If and when a transcript is produced, this will be so obvious and plain as to obviate comment. Item: His comment on the computerized journals and ledgers: Garbage in- Garbage out (in front of the jury).

NUMEROUS ERRORS IN ADMITTING OR REFUSING EVIDENCE, INSTRUCTING THE JURY, AND OTHER JUDICIAL MISCONDUCT.

This will also be evident in the transcript, as will the judge's personal slurs, insults and deprecations of petitioner.

CONCLUSION

While this matter may not fit the rigid criterion for certiorari set forth in the rules, it does present a picture of callous, outrageous judicial conduct, and a good demonstration of "how the system doesn't work", unless this court feels constrained to grant appropriate relief. It does not justify a laboriously reasoned opinion reversing a circuit court simply because there is no circuit court opinion to reverse.

What it does demonstrate, however, is ample grounds to vacate the order of dismissal and remanding it to a court

of appeals for a determination of the appellate issues on the merits, or, even better, to a District Court for a new trial.

To avoid a resumption of the harrasment that will follow a remand to the Tenth Circuit, or to the District Court for the District of Utah, petitioner requests a transfer to either the Ninth Circuit Court of Appeals, or to the District Court for the District of Nevada in Las Vegas. Petitioner can find no authority either for or against this request, but would be grateful for an opportunity to either have the case itself or the appeal heard on the merits.

Respectfully submitted,

John E. Dennett
P. O. Box 6163
Salt Lake City, Utah 84106

NOVEMBER TERM - NOVEMBER 30, 1971

Before Honorable Delmas C. Hill and Honorable Robert H. McWilliams, Circuit Judges

A true copy

Teste

Howard K. Phillips
Clerk, U. S. Court of Appeals, Tenth Circuit

By _____
Deputy Clerk

THE CONTINENTAL BANK AND TRUST COMPANY,

Plaintiff-Appellee,

v.

JOHN ELWOOD DENNETT,

Defendant-Appellant,

UNITED STATES OF AMERICA,

Defendant-Appellee,

C. DWAYNE HARRISON, BENEFICIAL LIFE INSURANCE COMPANY, a corporation, and HERSCHEL J. SAPERSTEIN, Trustee in Bankruptcy No. B-1153-67,

Defendants.

No. 71-1466

This matter comes on for consideration of appellant's motion filed November 15, 1971 for appropriate relief including an extension of time to file briefs.

Upon consideration whereof, it is the ORDER of the Court that appellant is granted until December 20, 1971 within which to file his opening brief.

It is the further ORDER of the Court that no further extensions will be granted appellant.

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

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UNITED STATES COURT OF APPEALS
FOR THE CIRCUIT

CASE NO. 71-1466 | The Continental Bank & Trust Co. v. John Elwood Dennett

DATE	FILINGS—PROCEEDINGS	Filed
8/26/71	Cause docketed; record on appeal retained in District Court; docketing statement, 4 cc.	
/2/71	Appearance - [illegible] - Clark - Appellee	
/8/71	Order - assigned to Accelerated Calendar; appellant's brief due 9/16/71 - Lewis	
/13/71	Appearance - Appellees - Ugast, Rothwacks	
17/71	Stipulation for ext. of time for 90 days to file appellant's brief - Orig. only	
9/22/71	Appellant's stipulation for ext. of time to file brief granted to 1 Clerk-Rule 11 BHS	
/15/71	Appellant's motion for ext. of time to file brief - orig. & 2cc - - cert. of serv.	
/18/71	(Submitted to Lewis, Hill and McWilliams)	
1/29/71	Order: Appellant granted ext. of time to 12/20/71 within which to file brief - NO FURTHER EXTENSIONS WILL BE GRANTED - Hill McWilliams	
/21/71	Appellants brief - orig & 6cc. [illegible]	
30/71	Rule 14 letter - Failure to file motion to file brief out of time; index, cover page & cert. of serv. for brief	
1/72	Appellee's motion for ext. of time to file brief - and Memo. in support of appellee's moth. for ext. of time to file - 0 & 3cc - Copy of letter to Dennett from U.S. stating their request that Dennett transmit the entire record (including transc. of trial) our Court. (Submitted to Hill and McWilliams - 1/11/72)	
17/72	Appellant's motion for leave to file opening brief on 12/21/71 - 0 c/s (Submitted to Judge McWilliams 1/18/72) cert. of service on brief of 12/21/71. (Above motion resubmitted to McWilliams, and Judge Hill - 1/19/72)	
26/72	Order - motion for leave to file opening brief on 12/21/71 denied and appeal ordered dismissed for failure of appellant to timely prosecute - Hill, McWilliams	
2/72	Mandate to Clerk (ORA retained in Dist. Court - not returned)	
2/2/72	Appellant's Motion for ext. of time to file pet. for rehearing - 0 c/s (Submitted to Hill, McWilliams)	
2-72	Receipt for mandate from Clerk., U.S. Dist. Ct. Filed - WHP	
15/72	Order: Motion for extension of time within which to file petition for rehearing is denied. (Hill, McWilliams)	

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United States Court of Appeals
TENTH CIRCUIT
OFFICE OF THE CLERK
DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

December 30, 1971

Mr. John E. Dennett
1243 East 2100 South
Salt Lake City, Utah 84106

Re: No. 71-1466, Continental Bank & Trust Co. vs. Dennett
Failure to file motion to file brief out of time; index, cover page & cert. of serv. for brief

Dear Mr. Dennett:

The file of this office indicates that you have not met the above procedural requirement.

In accordance with Rule 14 of the 1970 rules of this Court, the appeal will be dismissed unless within fifteen (15) days you remedy the default.

For your convenience, a copy of Rule 14 is enclosed herewith.

Very truly yours,

HOWARD K. PHILLIPS
Clerk

By: D. Dennis Conk
Deputy Clerk

Enc.

cc: Glen E. Clark, Fabian & Clendenin, 800 Continental Bank Bldg. Salt Lake City, Utah 84101
Fred B. Ugast, Asst. Atty. Gen., Meyer Rothwacks, Atty., Dept. of Justice, Tax Division, Washington, D. C. 20530

Rec. 1-3-72

JANUARY TERM, JANUARY 26, 1972

Before Honorable Delmas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges.

THE CONTINENTAL BANK AND TRUST COMPANY, Plaintiff-Appellee, vs. JOHN ELWOOD DENNETT, Defendant-Appellant, UNITED STATES OF AMERICA, Defendant-Appellee, C. DWAYNE HARRISON, BENEFICIAL LIFE INSURANCE COMPANY, a corporation, and HERSCHEL J. SAPERSTEIN, Trustee in Bankruptcy No. B-1153-67, Defendants.	)	No. 71-1466

On November 29, 1971, appellant was granted an extension of time to December 20, 1971, within which to file his opening brief with the further order that no further extension of time in this regard would be granted. On December 21, 1971, appellant attempted to file with this Court an opening brief which was received but not filed by the Clerk of this Court for the reason that the brief was tendered one day late and for the further reason that the brief as tendered did not contain a cover page, an index or a certificate of service. Appellant was told by the Chief Deputy that he must promptly file a motion for leave to file his brief out of time, and must provide a cover page, an index and a certificate of service as required by the rules.

Thereafter on January 17, 1972, appellant tendered to the Court a new set of briefs which did contain a cover page, an index and a certificate of service together with a motion that he then be permitted to file his opening brief. Under such circumstances the appellant's Motion for Leave to File Opening Brief on December 21, 1971 [the brief with a cover page, an index and a certificate of service was not tendered on December 21, 1971, but was tendered on January 17, 1972], is hereby DENIED and the appeal is hereby ORDERED DISMISSED for failure of the appellant to timely prosecute.

Howard K Phillips

HOWARD K. PHILLIPS, Clerk

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Teste

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By

Deputy Clerk

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United States Court of Appeals

TENTH CIRCUIT

OFFICE OF THE CLERK

DENVER, COLORADO 80202

HOWARD K. PHILLIPS
CLERK

February 15, 1972

TELEPHONE
303-837-3187

Mr. John E. Dennett
1243 East 2100 South
P.O. Box 6163
Salt Lake City, Utah 84106

Re: No. 71-1466
Continental Bank and Trust Co.
v. John Elwood Dennett, et al.

Dear Mr. Dennett:

An Order has been entered today denying appellant John Elwood Dennett's motion to extend the time within which to file petition for rehearing in the captioned case.

Yours very truly,

Howard K. Phillips

HOWARD K. PHILLIPS
Clerk

HKC
cc: Mr. Glen E. Clark
Fabian and Clendenin
800 Continental Bank Bldg.
Salt Lake City, Utah 84101

Mr. Fred B. Ugast, Asst. Attorney General
Mr. Meyer Rothwacks, Attorney
Department of Justice - Tax Division
Washington, D. C. 20530

Rec'd 2-19-72

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February 12, 1972

TO WHOM IT MAY CONCERN:

Mr. John E. Dennett first consulted me in January 1971 regarding an infec tion in his hand, which I treated through minor surgery.

Between April 1971 and the fall of 1972 I saw him several times, but without reference to any specific ailment, except that he was undergoing considerable strain due to some unexpected interruptions in his work during April, May and June 1971 and the resultant accumulation of unfinished work.

He consulted me again on February 12, 1972. He was obviously ill, suffering from some type of pulmonary infection. He stated that he had been forced to assume the full load of his own defense in a trial which had begun November 1, 1971 in New York City, and that because of the exigencies of that ordeal, he had been forced to walk long distances to and from court in the rain and that this had continued from November 1, 1971 to about November 12, 1972. As a result thereof and because of inadequate diet, he had become weakened and had contracted a severe head and chest cold.

The head and chest cold progressed into a bronchial infection, which worsened throughout November and early December, during which time he moved temporarily to Los Angeles, California to enhance his recovery.

In Los Angeles his condition became worse instead of better and upon suspecting that something very serious might be developing, he consulted with Dr. William Wentz in Inywood, California, who prescribed heavy dosages of anti-biotics and bed rest as the only alternative to hospitalization.

He stated that as a result of the backlog of work, he was unable to either accept hospitalization or complete bed rest, and that when he did not respond to the anti-biotic medication, he consulted with Dr. Samuel Mintz, who prescribed the same bed rest or hospitalization but changed the anti-biotic medication, administering large doses intramuscularly. Mr. Dennett also failed to respond to this treatment, partly because he was still unable to accept hospitalization and bed rest due to business pressures which prevented it, no doubt due to the infection being of a viral nature.

Upon hearing the case history and making initial observation of his condition, I ordered chest x-rays and performed other usual tests. The reading of the x-rays and the interpretation of other tests indicated clearly that he had had a pneumonia in the right lower lobe; while the crisis had already passed when he first consulted me with his ailment, his respiratory system exhibited considerable residual infection. The diaphragm was partially collapsed on the left side, as a result of partial right lower lobe atelectasis.

This particular ailment, sometimes loosely called "walking pneumonia" although serious, permits its victim to function normally a few hours at a time. Although they shouldn't succumb to the temptation to work, they can sometimes work two or three hours at a time at a rather normal pace, if the work period is preceded and followed by a day bed rest, a pattern, which if followed, can substantially prolong the period of convalescence, if the victim, is fortunate enough to escape more serious complications by disregarding medical advice.

While Mr. Dennett appears to be out of immediate danger and reasonably well on the way to recovery, his condition has left him considerably weakened. He should continue with his anti-biotic medication for two more months, and during that period should avoid overwork, exhaustion, strain, and emotional fatigue, an unlikely prospect in view of his history up to this point and his own statement that his obligations and committments will not permit him any relaxation in the frenzied schedule he feels compelled to follow.

Very truly yours,

George W. Taylor, M.D.

George W. Taylor, M.D.
1559 Cherokee Circ.
Salt Lake City, Utah.

945 NORTH LAKE AVENUE • PASADENA, CALIFORNIA 91104 • TELEPHONE (213) 349-5911

June 2, 1972

Re: John E. Dennett

TO WHOM IT MAY CONCERN:

This will certify that I have been a physician to the above noted patient and will attest to attending to his infirmities during the month of January of this year. At that time he gave evidence of having pneumonia-like symptoms and was treated with antibiotics, with a recommendation for hospitalization. It was his election at that time, because of the pressures of his work loan and responsibilities, that he felt he was incapable of taking the time to spend a therapeutic time in the hospital, though it was strongly recommended.

Mr. Dennett reports at this writing that he has since been ill and has not fared well and has continued on with a continuation of the symptoms of his upper respiratory infections.

On this date he is still complaining of a fatigue syndrome and appears to be anxious and under emotional stress, but determined to ignore the professional advice of hospitalization and supportive care.

If there is any further information that you require, please feel free to notify.

Very truly yours,

Samuel Nintz, M.D.

SM:rw

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Form 872
(Rev. Dec. 1953)

U.S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

IN REPLY REFER TO
Platte Cla
Room 467

Pursuant to existing Internal Revenue laws, John Elwood Dennett

, a taxpay

(or taxpayers) of 1213 East 2100 South, Salt Lake City, Utah 84106
(Number, street, city or town, State, ZIP Code)

, c

the District Director of Internal Revenue (or Assistant Regional Commissioner-Appellate) hereby consent and agree
follows:

That the amount of any Federal income or profits taxes due under any return (or returns) made by or on b
half of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1961
under existing or prior revenue acts, may be assessed at any time on or before May 31, 1969
except that if a notice of a deficiency in tax is sent to the taxpayer (or taxpayers) by certified or registered mail on c
before such date, then the time for making any assessment as aforesaid shall be extended beyond such date by th
number of days during which the making of an assessment is prohibited and for sixty days thereafter.

DEFENDANT'S EXHIBIT

Signature: John E Dennett	Date:	
Signature	Date	
Signature	Date	Corporate Seal
District Director of Internal Revenue or Assistant Regional Commissioner - Appellate		
Signature: H. E. Mills	Title: Chief, Audit Division	Date: NOV 2 7 1967

If the consent is executed for a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both husband and wife unless one, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, the consent must be signed in the corporate name followed by the signature and title of the officer(s) duly authorized to sign. It is not necessary that the corporate seal be affixed. The space provided for the seal is for the convenience of corporations required by charter or by the laws of the jurisdiction in which they are incorporated to affix their corporate seals in the execution of instruments.

The consent may be executed by the taxpayer's attorney or agent provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany the form.

If the consent is executed by a person acting in a fiduciary capacity (such as executor, administrator, trustee, etc.), Form 56, "Notice of Fiduciary Relationship," should, unless previously filed, accompany this form.

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Form 668-B
(Rev. Jan. 1970)

Department of the Treasury
Internal Revenue Service

Levy

Name and address of taxpayer

John Elwood Bennett
1243 East 21st South St.
Salt Lake City, Utah

Originating Internal Revenue District (City and State)

Salt Lake City, Utah

Kind of Tax	Tax Period Ended	Date of Assessment	Identifying Number	Unpaid Balance of Assessment	Statutory Additions	
1040	6112	5/17/68	8764711222268 68	$105,182.25	$14,825.19	$ 120,0
1040	12-31-62	5/17/68	529-28-7324	81,040.33	16,694.28	97,7
					Total Amount Due ▶	$ 217,7

There is now due, owing, and unpaid with respect to the above-named account, the amounts set forth herein for revenue taxes for which notice and demand has been made for payment. Section 6331, Internal Revenue Code, authorizes collection of taxes by levy upon all property or rights to property of a taxpayer (except property that is exempt under section 6334) or on which the lien provided by section 6321 exists. Therefore, under the provisions of section 6331, so much of the property or rights to property, either real or personal, as may be necessary to satisfy the unpaid assessment set forth herein together with additions provided by law, including fees, costs, and expenses of levy, are hereby levied upon in order to satisfy the taxes and additions.

Dated at Salt Lake City, Utah this 5th day of October

Signature	Title
	Revenue Officer

Form 668-B

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67-01 12-36

Notice of Seizure

Internal Revenue Service

John Elwood Bennett
1243 East 21st South Street
Salt Lake City, Utah

Pursuant to the authority in section 6331 of the Internal Revenue Code and by virtue of a levy placed in my hands for execution by the District Director of Internal Revenue of the district shown below, I have seized the following described property for non-payment of delinquent internal revenue taxes:

Name and Address of Taxpayer	In the Amount of	Internal Revenue District (City and State)
John Elwood Bennett 1243 East 21st South Street Salt Lake City, Utah	$ 217,742.05	Salt Lake City, U

Description of Property

leather covered couch Blue-
Burroughs Sensimatic Series 200
Hoover vacuum cleaner
Model 63 # 1189615
(Slotter Rock (Cherished wood)
walnut Coffee Table.
Brown wool oversized chair
Brown couch
Blue Office swivel tilt chair
Green secretary chair
Metal Folding chair
miscellaneous inclusions in premises
Locked
unopened Box addressed to
John Bennett in front of premises
Boxes cancelled cash register.
Burning Copyfast Model 100
Record Book # 27178
Filmac Fax Check Protector # 502 1126
IBM Typewriter 1735873 D

1- Portable Microfilmer Ser 55-
Model B Tape.
1. Photostograph V-Kol-Pgc 33
1. Filing Boxes cabinet & plate
1. Imperato Paper Cutter.
1. 5 Tier metal desk file.
2- 1 Bin Filing Cabinets
5- Metal Cole Steel 2 drawer file C
1- Cole steel 4 drawer file C
1. Metal Typewriter Table
25-(App) large Boxes of Mi
Materials, 4 Desk Organizers & Can
30-1 Bin Boxes (Apt)
1- Lot miscellaneous property in
office. Includes papers, office supplie
And all other property of Elwood B
Seized on the premises of 1243 E 21s
Date 6:00 on 10-05-71. A supple
tax notice of seizure providing a
detailed itemization of this pro
will be given as soon as a detail
inventory is completed.

Name of Revenue Officer	Address	Date
[signature]	PO Box 2416 SLC Ut Fifth Floor	10-05-71

Form 2433 Part 1 (Rev. 8-

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Mr. R. Steadman and
Mr. Hirst
% U. S. Treasury Department
U. S. Courthouse and Post Office Building
Salt Lake City, Utah 84110

Gentlemen:

At our recent conference, I promised to summarize for you the salient portions of our conversation, in writing, so that we could have a record of the things which we did discuss, and, by implicati what we did not discuss:

1. I owe absolutely no taxes for the years 1961, 1962 and 1966. The question of the 1961 tax liability is on appeal to the Tenth Circuit Court. The 1962 taxes are the subject matter for a petition for abatement and the 1966 taxes have never been legally assessed. It is seriously disputed that Mrs. Dennett ever signed the 1966 return and you were going to requisition that return so that we can examine it. If it turns out that she did sign it, she will file an amended return, since she had no income.

2. If any taxes were owed, the liability was and is discharged by proceedings B-1153-67 now pending before the Federal Dist Court.

3. If there was any liability for 1962 taxes, the assessment ha been merged ino the judgment rendered by Judge Christensen must be executed upon by the marshall. Moreover, the judgm is on appeal and will certainly be reversed. The right of the treasury department to act upon the matter ceased the momen the matter became a judgment. Moreover, the Utah State La and not the federal laws now govern the question of exemptions from execution. While the federal law gives narrower exempt in tax matters, when the matter becomes a judgment, state la applies, which has broader exemptions.

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4. While the law might, under other circumstances, allow you to levy upon property, it does not give you the right to summarily dispossess or evict a person from their office premises or their home. It might, under other circumstances, allow you to sell any such interests, but this is quite a different matter than summary dispossession and exclusion from premises and records. It also does not grant you the right to enter into and upon the premises without specific invitation and permission.

5. You have seized property, which, in large part, does not belong to me. If anything does belong to me among the things which you seized, it is minimal and any interest which I have in them is marginal. Each of the owners of the property, together with each party which is entitled to uninterrupted possession of the premises which you have seized holds you personally responsible for your illegal acts and damages are accruing by reason thereof on a daily basis.

6. Should any of the property be sold, the sale will be illegal and those persons who are entitled to the possession thereof will pursue replevin actions in the hands of the purchasers. Moreover, they will each hold your personally liable for damages.

7. You are personally liable, as tortious bailees, for the safety and integrity of the property which you have seized. You will be assessed damages not only for the illegal seizure, but for the daily damages accruing by reason of your denial to the true owners of the use thereof, to which they are entitled.

8. There is nothing in your power which permits you to inspect records, or to snoop, or to invade any areas of my private domain of the private domain of persons whose records were exposed by reason of your illegal trespass and entry. You had no search and seizure warrant and your taking of corporate and client records will have severe consequences.

The pursuit of your several indiscretions must of necessity await disposition of other matters, which, because of their urgency, take ority. It will also be wise to research the law on the matter very efully, which will take time which I do not now have, but which I will during the month of November. It may be that other people, tax ors in particular, may tolerate overreaching and unconstitutional duct on the part of the treasury department out of a basic fear for ernment agencies and a reluctance to take on the government in a l battle. You will find neither fear not reluctance on my part. On contrary, you will find me rather eager to test the legal and con- tional questions which your conduct brings to light.

Y BOUND CLOSE IN CENTER

I fear that you have made some rather grevious errors which I am not constrained to overlook or forgive. Time permitting, next month, I intend to pursue the redress of every wrong to the fullest extent of the law.

In the meantime, continuing demand is made upon you, on my own behalf and the behalf of those third parties whose property you have seized and whom you are denying possession and access to their legal premises, that you release the property forthwith and resurrend possession of the seized premises.

Very truly yours,

John E. Dennett
1243 East 2100 South
Salt Lake City, Utah 84106.

Please note that my only address is: 1243 East 2100 South, Salt Lake Utah 81406. Please address all correspondance to this address only.

COPY PRINTED CLOSE TO EDGE

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1682

JOHN ELWOOD DENNETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court, set forth in Appendix A, *infra*, pp. 9-17, are not reported. The order of the Tenth Circuit Court of Appeals dismissing the petitioner's appeal, set forth in Appendix A, *infra*, pp. 18-19, is not reported.

JURISDICTION

The order of the court of appeals was entered on January 26, 1972. A motion for extension of time

to file a petition for rehearing was denied on February 15, 1972. Mr. Justice White granted successive extensions of time for filing the petition for a writ of certiorari to May 25, 1972, and to June 24, 1972. The petition for a writ of certiorari was filed on June 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

QUESTION PRESENTED

Whether the court of appeals abused its discretion in dismissing petitioner's appeal for failure to file his opening brief within the time provided after liberal extensions.

RULES INVOLVED

The pertinent provisions of Rules 12, 25, 28 and 31 of the Federal Rules of Appellate Procedure are set forth in Appendix B, *infra*, pp. 20-21.

STATEMENT

The underlying controversy in this case arose from an assessment for federal income taxes against petitioner in the amount of $112,235.67 (including penalties and interest). After the assessment was made, Continental Bank & Trust Company held a fund to which there appeared to be several competing claimants, including the petitioner and the United States, by virtue of its tax assessment against the petitioner.

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[1] Petitioner invokes this Court's jurisdiction also under 28 U.S.C. 1651(a) and 2241, but it is apparent that jurisdiction properly lies only under Section 1254(1).

Accordingly, Continental Bank & Trust Company brought an interpleader action, depositing the fund into court and joining as defendants in interpleader the petitioner and the United States, among other parties.

In its answer and cross-claim, the United States asserted that federal income taxes for the year 1961 had been assessed against the petitioner in the amount of $112,235.67 and requested that the district court adjudge petitioner's liability for the taxes and grant the United States priority to the interpleaded fund.

Trial of the interpleader action was held during September 1970 in the United States District Court for the District of Utah. Following the advice of a specially impanelled advisory jury, the district court held that petitioner owed federal income taxes for 1961 in the amount of $117,043.76 (including penalties and interest) and that the United States had priority to the interpleaded fund. The court rendered judgment accordingly.

Petitioner then filed a timely notice of appeal to the Tenth Circuit Court of Appeals.

The appeal was docketed on August 26, 1971, and petitioner was notified on that date that he should be prepared to file his opening brief by September 16, 1971. On September 8, 1971, the Tenth Circuit Court of Appeals by letter from its Deputy Clerk advised petitioner that the appeal had been assigned to the summary calendar, making the brief due on September 16, 1971, and further advised:

briefs *must* comply with the Federal Rules of Appellate Procedure, and will not be accepted for filing unless and until they do so comply. See Rule 28 in particular.

On September 17, 1971, petitioner filed a purported stipulation between himself and the United States for an extension of time for ninety days within which to file the briefs in the case.[2] The extension granted was to and including November 16, 1971. On November 15, 1971, petitioner filed a motion requesting the following relief: (1) an extension of time for filing his opening brief; (2) provision of a trial transcript, which had not yet been prepared, because he could not afford to pay for one; and (3) appointment of a special master to redetermine his tax liability.

The United States responded to this motion by letter stating in pertinent part: (1) the government had no objection to any reasonable extension of time; (2) if the request for a trial transcript could be read as a request that the government incur the cost therefor, the government did oppose that request, particularly since petitioner had not filed a request for leave to proceed *in forma pauperis*; and (3) the government opposed the appointment of a special master to redetermine petitioner's tax liability, for any error in the district court's determination could be pre-

[2] Rather than stipulating to the said extension, however, the United States through a local Assistant United States Attorney merely stated that it had no objection to the granting of the extension by the court.

sented in the appellate brief and argument in the usual manner.

On November 29, 1971, the court of appeals granted only petitioner's motion for an extension of time and limited that extension to December 20, 1971, with the further notation that no further extensions would be granted to petitioner.

On December 21, 1971, petitioner personally delivered a document entitled "Opening Brief" to the office of the Clerk of Court for the Tenth Circuit Court of Appeals. The Clerk's docket entry indicates that the brief was received but not filed. On December 30, 1971, the Deputy Clerk of Court notified petitioner by letter that petitioner had not filed a motion to have his brief filed out of time and that the brief received by the court did not have an index, cover page or certificate of service. The Deputy Clerk advised that, under the local rules of the court, the appeal would be dismissed unless petitioner remedied the stated defects within fifteen days of the date of the letter.

On January 17, 1972, petitioner tendered new "opening briefs" amended to include cover page, index and certificate of service, and filed a motion for leave to file his opening brief on December 21, 1971. On January 26, 1972, Judges Hill and McWilliams of the Tenth Circuit Court of Appeals denied petitioner's motion for leave to file on December 21, 1971, and dismissed petitioner's appeal for failure to timely prosecute because petitioner had failed to file the brief on time.

On February 10, 1972, petitioner filed a motion for extension of time to file a petition for rehearing. This motion was denied by Judges Hill and McWilliams on February 15, 1972.

ARGUMENT

The order of dismissal was within the discretion of the court of appeals. There is no conflict or other reason for review.

This Court recognized in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629-633, that a court has inherent power to dismiss *sua sponte* a case for failure to prosecute and that the only review therefrom will be for an abuse of discretion. Although *Link* involved dismissal by a trial court, similar considerations are appropriate on appeal. The orderly and efficient administration of appeals requires that the courts of appeals have this power.

The court of appeals here did not abuse its discretion in dismissing the appeal. Petitioner had been given liberal extensions, totalling 95 days, in addition to the twenty-one days provided with respect to appeals assigned to the summary calendar, within which to file his opening brief, and he had been explicitly warned upon being granted the final extension that no further extensions would be granted.

Petitioner's assertion (Pet. 22) that he qualified for the "timely mailing, timely filing" provision of Rule 25, Fed. R. App. P., is without merit. The "timely mailing, timely filing" provision is simply

not applicable when the briefs are posted but intercepted at the sender's behest and returned to him prior to delivery to the court.[3]

Furthermore, petitioner has never satisfied his obligation to present to the court of appeals a record, including the trial transcript, from which the errors of which he complains may be demonstrated. This failure would alone justify dismissal of his appeal. See Rule 12(c), Fed. R. App. P. Petitioner does not suggest here that he is now willing to comply with this requirement, and should the case be remanded

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[3] Petitioner's alleged reason for taking this unusual and, in light of Rule 25, unnecessary action is (Pet. 22) that he purchased metered postage for the briefs at the Salt Lake City Airport postal facility on December 20, 1971, the last date of the final extension, but that he retrieved the briefs from the postal facility in order to permit him to hand-deliver the briefs to the court in Denver. The alleged reason for the retrieval was that fog had prevented ingress and egress from the Salt Lake City Airport on December 20, 1971, and, fearing that the Clerk of Court would dismiss the appeal on December 21, before the mail could arrive, he decided to deliver the briefs personally "as soon as the fog lifted." In his motion for leave to file his "opening brief" on December 21, 1972, petitioner made no mention of having posted the briefs but stated that the airport "was closed due to fog conditions and no airplanes departed the airport for Denver on the afternoon or evening of December 20, 1971."

We are informed by the United States Postal Service that the Salt Lake City Airport has no postage metering device. Moreover, we have been informed by Western Air Lines and United Air Lines, both of which have service between Salt Lake City and Denver, that, although the airport was experiencing inclement weather conditions on that date, flights were departing Salt Lake City for Denver on December 20, 1971.

to the Tenth Circuit, the government will be compelled to file a motion to dismiss under Rule 12(c).[4]

For these reasons, we respectfully submit that the court of appeals did not abuse its discretion in dismissing taxpayer's appeal for failure to file his brief in time and in the appropriate form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

SCOTT P. CRAMPTON,
Assistant Attorney General.

MEYER ROTHWACKS,
JOHN A. TOWNSEND,
Attorneys.

AUGUST 1972.

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[4] Petitioner alleges (Pet. 20) that he was unable to prepare an opening brief because the government had seized his trial records and would not return them. We deny this allegation. In an attempt to locate assets of petitioner, Internal Revenue Service officials had seized and padlocked petitioner's offices. Sometime within three days after this seizure, someone broke into the offices and removed certain of petitioner's files. Investigations are presently being made into this forcible entry and burglary.

We note in this regard, however, that the original trial record (excepting the trial transcript, which has never been prepared) remains in the trial court at the stipulation of the parties. Petitioner's assertion to the contrary (Pet. 21) is inaccurate. Thus, petitioner could have prepared his brief by reference to the original record but still would have been confronted with the absence of a trial transcript.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Civil No. C 203-68

CONTINENTAL BANK & TRUST COMPANY, PLAINTIFF

vs.

JOHN ELWOOD DENNETT, ET AL., DEFENDANTS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This cause came on before the Court for trial on September 21, 1970 in Salt Lake City, Utah, and a jury was duly impanelled to hear and determine the facts of this matter in an advisory capacity in accordance with Rule 39(c) of the Federal Rules of Civil Procedure. The defendant United States of America was represented by John R. Gauntt, Tax Division, Department of Justice, and H. Ralph Klemm, Assistant United States Attorney for the District of Utah; defendant John Elwood Dennett acted as his own attorney; defendant Clyde Dwayne Harrison was represented by Walter R. Ellett, Attorney at Law; and defendant Herschel J. Saperstein, Trustee in Bankruptcy, was represented by Bill Thomas Peters, Attorney at Law. The Court has heretofore granted summary judgment in favor of the plaintiff Continental Bank & Trust Company, releasing and discharging said plaintiff from further liability with respect to the monies paid into the registry of this Court, and the defendant Beneficial

Life Insurance Company was heretofore dismissed from this action by the Court.

At the conclusion of the presentation of the evidence by the parties, and after all parties had rested their cases, the Court, upon motion of the defendant United States of America, dismissed the claims of defendant Herschel J. Saperstein, Trustee in Bankruptcy, on the ground that there was no evidence to show that the funds on deposit with the Clerk of the Court came from property owned by the defendant John Elwood Dennett on or before September 14, 1967, the date upon which he filed his petition in bankruptcy. The motion of defendant United States of America for default judgment and defendant John Elwood Dennett's motion to strike the cross-complaint of the United States are hereby denied.

The Court submitted special interrogatories to the jury pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, and after due deliberation, the jury returned to the Court and reported that they had unanimously answered the following interrogatories as shown herein:

1. Do you find by a preponderance of the evidence that when the "Waiver", U.S.A. Exhibit 11, was signed by John Elwood Dennett it had been completed to include specific reference to the taxable year 1961?

Answer: Yes

2. Do you find by a preponderance of the evidence that at the time of the signing of said waiver John Elwood Dennett understood and intended that it would relate to the taxable year 1961?

Answer: Yes

3. Do you find from a preponderance of the evidence that defendant John Elwood Dennett's net taxable income upon which his income tax should have been computed for 1961 was:

$3055.78 (as reported by defendant John Elwood Dennett)?

Answer: No

$111,055.81 (as contended by the government)?

Answer: Yes

Another amount? (if so, state) $_____

4. Do you find by a preponderance of the evidence that at the time of the tax levy John Elwood Dennett was the actual owner of the funds totaling $7052 in question?

Answer: Yes

5. Do you find by a preponderance of the evidence that at the time of said levy C. Dwayne Harrison was the actual owner of said funds?

Answer: No

(If your answers to questions 4 and 5 are both no, then answer question 6.)

6. Do you find by clear and convincing evidence that any such funds were held in trust by either John Elwood Dennett or C. Dwayne Harrison for someone else at the time of said levy?

Answer: No

(If your answer to question 6 is yes, then answer question 7.)

7. State by whom, for whom and in what amount, if any, such funds were held in trust.

Dated this 26th day of September, 1970.

FOR THE JURY

/s/ VERSEL J. MASON
Foreman

After considering the verdict returned by the advisory jury and deeming the answers to said special interrogatories to be consistent with the facts shown by a preponderance of the evidence presented by the parties in this matter, the Court now makes the following

FINDINGS OF FACT

1. The Court hereby adopts the answers of the jury to the special interrogatories as part of its own findings of fact.

2. On September 14, 1967, the defendant John Elwood Dennett filed an original petition for relief under the provisions of Chapter XII of the Bankruptcy Act in the above-entitled Court.

3. On December 4, 1967, the defendant John Elwood Dennett was involuntarily adjudged a bankrupt under the said Act.

4. On May 17, 1968, an assessment was made against John Elwood Dennett by the Internal Revenue Service in the sum of $112,235.67, which represents an income tax deficiency for 1961, together with penalties and interest to the date of the assessment.

5. Timely notice of said assessment for 1961 was given to defendant John Elwood Dennett in accordance with the provisions of the Internal Revenue Code, and demand for payment thereof was made as provided by law.

6. On or about October 23, 1968, the plaintiff, Continental Bank & Trust Co. issued its Cashier's Checks Nos. 74547 in the sum of $3,860.00 and 74548 in the sum of $3,192.00, to the order of the Beneficial Life Insurance Company. Tender of said checks was made by defendant John Elwood Dennett to the Beneficial Life Insurance Company, but such tender was refused and the checks were returned to said defendant.

7. On October 31, 1968, the plaintiff Continental Bank & Trust Company was served with a notice of levy by the Internal Revenue Service, particularly directed at the funds covered by the aforementioned Cashier's Checks. This levy was made to enforce a tax lien filed with the Salt Lake County Recorder on July 23, 1968 against defendant John Elwood Dennett relative to the deficiency in his 1961 income taxes.

8. The defendant John Elwood Dennett was in truth and in fact the owner of the funds represented by the two Cashier's Checks, payable to the Beneficial Life Insurance Company, designated as Exhibits USA No. 3 and USA No. 4, when the Internal Revenue Service filed its levy on the funds in question. The interest in the funds on deposit with the Clerk was acquired by said defendant after September 14, 1967.

9. In filing his income tax return for 1961, the defendant John Elwood Dennett omitted from his gross income an amount properly includable therein, that is over 25% of the amount of gross income actually stated in the tax return.

10. The income tax return of John Elwood Dennett for 1961 was delinquent when filed. There has been no showing by said defendant that due care was

exercised in the preparation of the tax return or in the keeping of adequate records as required by Section 6001 of the Internal Revenue Code.

From the foregoing Findings of Fact, the Court now makes its

CONCLUSIONS OF LAW

1. The Net Worth and Expenditures Method of Proof was properly used by Internal Revenue agents to determine the taxable income of defendant John Elwood Dennett for 1961.

2. The Statute of Limitations does not bar the action of the defendant United States of America against the defendant John Elwood Dennett for unpaid taxes for 1961.

3. No trust relationship existed between the defendant John Elwood Dennett and any other person pertaining to the ownership of the funds on deposit with the Clerk of the Court.

4. No trust relationship existed between the defendant Clyde Dwayne Harrison and any other person pertaining to the ownership of the funds on deposit with the Clerk of the Court.

5. The Court does not have jurisdiction to enjoin the collection of Internal Revenue Service taxes, and the cross-claim of defendant John Elwood Dennett should be dismissed.

6. The defendant Clyde Dwayne Harrison is not entitled to any part of the funds on deposit with the Clerk of the Court.

7. The defendant Herschel J. Saperstein, as Trustee in Bankruptcy of the estate of defendant John Elwood Dennett, is not entitled to any part of the funds on deposit with the Clerk of the Court.

8. The Federal Tax Lien for taxes due and owing by defendant John Elwood Dennett for 1961 attaches to the funds on deposit with the Court. The defendant United States of America, by reason of its Internal Revenue Service levy served upon the plaintiff Continental Bank & Trust Company, is entitled to a judgment of this Court awarding the funds on deposit with the Clerk of the Court to the government.

9. The judgment of the State Court in litigation involving the Beneficial Life Insurance Company and defendant John Elwood Dennett has no effect on this litigation.

10. The six-year Statute of Limitations for the assessment of the tax provided in Section 6501(e)(1)(A), of the Internal Revenue Code of 1954 is applicable to the claims of defendant John Elwood Dennett in this case.

11. The statutory period for the assessment of the 1961 income tax deficiency was properly extended by agreement in writing between a delegate of the Secretary of the Treasury and defendant John Elwood Dennett in accordance with Section 6501(c)(4) of the Internal Revenue Code of 1954.

12. Defendant John Elwood Dennett was subject to a negligence penalty provided by Section 6653(a) of the Internal Revenue Code in connection with the understatement of his income in his 1961 tax return.

13. Defendant John Elwood Dennett was subject to a delinquency penalty provided by Section 6651 of the Internal Revenue Code in connection with the understatement of his income in his 1961 tax return.

14. The defendant United States of America is further entitled to a judgment against the defendant John Elwood Dennett for unpaid taxes for 1961 in

the sum of $117,043.76 for delinquent income taxes, together with penalties and interest payable to and including September 21, 1970.

15. This sum is based on the following calculations:

Tax Assessment	$ 76,536.80
Interest to Date of Assessment	27,960.91
Interest Accrued Since Date of Assessment	11,861.51
Delinquency Penalty	3,869.23
Negligence Penalty	3,869.23
Total Tax Liability	$124,097.18
Less Payment	1.42
Less Amount of IRS Levy	7,052.00
Remainder Due and Owing for 1961 Taxes	$117,043.76

In addition thereto, the defendant United States of America is entitled to interest in the sum of $13.4837 per day to the date of judgment, or a total sum of $_____.

JUDGMENT

In accordance with the above Findings of Fact and Conclusions of Law, and based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The claims of defendants John Elwood Dennett, Clyde Dwayne Harrison and Herschel J. Saperstein, Trustee in Bankruptcy, in and to the funds on deposit with the Clerk of the Court in the sum of $7052.00 are dismissed with prejudice.

2. The defendant United States of America is lawfully entitled to the sum of $7,052.00 that was paid into the registry of this Court by the plaintiff. The Clerk of the Court is hereby ordered to pay said sum

to the Internal Revenue Service on demand, and the United States Attorney for the District of Utah shall acknowledge receipt thereof in the files and records of the Court.

3. The defendant United States of America is awarded judgment against the defendant John Elwood Dennett on its cross-claim in the sum of $117,043.76 for delinquent income taxes, together with penalties and interest computed thereon to September 21, 1970. In addition thereto, the defendant United States of America is entitled to interest in the sum of $13.4837 per day to the date of judgment, for the further sum of $_____. Interest on said amounts shall be payable at the rate of eight per cent (8%) per annum until the balance is paid in full.

4. The defendant United States of America is hereby awarded judgment against defendants John Elwood Dennett and Clyde Dwayne Harrison for its costs of court.

DATED this _____ day of October, 1970.

BY THE COURT:

_____

A. SHERMAN CHRISTENSEN
Judge
United States District Court

Submitted By:

H. Ralph Klemm
Assistant United States Attorney
Attorney for United States of America

JANUARY TERM, JANUARY 26, 1972

Before Honorable Delmas C. Hill, and Honorable Robert H. McWilliams, Circuit Judges

No. 71-1466

THE CONTINENTAL BANK AND TRUST COMPANY, PLAINTIFF-APPELLEE

vs.

JOHN ELWOOD DENNETT, DEFENDANT-APPELLANT, UNITED STATES OF AMERICA, DEFENDANT-APPELLEE,

C. DWAYNE HARRISON, BENEFICIAL LIFE INSURANCE COMPANY, a corporation, and HERSCHEL J. SAPERSTEIN, Trustee in Bankruptcy No. B-1153-67, DEFENDANTS

On November 29, 1971, appellant was granted an extension of time to December 20, 1971, within which to file his opening brief with the further order that no further extension of time in this regard would be granted. On December 21, 1971, appellant attempted to file with this Court an opening brief which was received but not filed by the Clerk of this Court for the reason that the brief was tendered one day late and for the further reason that the brief as tendered did not contain a cover page, an index or a certificate of service. Appellant was told by the Chief Deputy that he must promptly file a motion for leave to file his brief out of time, and must provide a cover page, an index and a certificate of service as required by the rules.

Thereafter on January 17, 1972, appellant tendered to the Court a new set of briefs which did contain a cover page, an index and a certificate of service to-

gether with a motion that he then be permitted to file his opening brief. Under such circumstances the appellant's Motion for Leave to File Opening Brief on December 21, 1971 [the brief with a cover page, an index and a certificate of service was not tendered on December 21, 1972, but was tendered on January 17, 1972], is hereby DENIED and the appeal is hereby ORDERED DISMISSED for failure of the appellant to timely prosecute.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

The Federal Rules of Appellate Procedure provide in pertinent part as follows:

Rule 12. DOCKETING THE APPEAL; FILING OF THE RECORD

* * * * *

(c) *Dismissal for Failure of Appellant to Cause Timely Transmission or to Docket Appeal.* If the appellant shall fail to cause timely transmission of the record or to pay the docket fee if a docket fee is required, any appellee may file a motion in the court of appeals to dismiss the appeal. * * *

* * * * *

Rule 25. FILING AND SERVICE

(a) *Filing.* Papers required or permitted to be filed in a court of appeals shall be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but filing shall not be timely unless the papers are received by the clerk within the time fixed for filing, except that briefs and appendices shall be deemed filed on the day of mailing if the most expeditious form of delivery by mail, excepting special delivery, is utilized. * * *

* * * * *

Rule 28. BRIEFS

(a) *Brief of the Appellant.* The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.

* * * * *

Rule 31. FILING AND SERVICE OF BRIEFS

* * * * *

(c) *Consequence of Failure to File Briefs.* If an appellant fails to file his brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. * * *

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